IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

(1) CIVIL WRIT No. 1728 of 2007

M/S.SHIVA WINES AND TOLLS LTD.
V/S
STATE & ORS.

(2) CIVIL WRIT No. 1729 of 2007

DHRUVA CAPITAL SERVICE LTD.
V/S
STATE & ORS.

Mr. MR SINGHVI, for the petitioner in cw no.1728/07
Mr. VIKAS BALIA, for the petition in cw no.1729/07

Mr. JP JOSHI, for the CAVEATOR, respondent
Mr. NM LODHA, Addl. Advocate General

Date of Order : 9.4.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

These two writ petitions involve common question of law, and fact, and therefore were heard together and are being decided together by this common order.

The facts giving rise to these two petitions are, that the petitioner in Writ Petition No. 1728 claims to be a limited company, and to be also registered with the Mining Department as Class 'A" Contractor with the registration valid upto 31.12.2007. It is alleged that in accordance with Rule 35 of the Rajasthan Mines and Mineral Concession Rules, 1986, hereafter to be referred to as the

Rules, tender notification was issued by the Director, Mines, Udaipur on 20.1.2007, and was circulated in local daily news-papers inviting tenders for Tehsils of Rajsamand District viz. Rajsamand, Kumbhalgarh, Amet and Railmagra, for grant of contract for excess royalty collection, notifying reserve price to be 63.70 Crores and giving details and procedure for grant of contract. According to the petitioner, in response to this notification no tenders were submitted, and therefore another notification was issued on 14.2.2007. It is alleged that according to the petitioner's information, in response to aforesaid notice private respondent gave its offer to the tune of Rs. 580021131/-. However, this offer was turned down on the ground of being below the reserve price, and since no tenders were received conforming the reserve price all the tenders were rejected. In these circumstances, yet another notification dt. 6.3.2007 was issued, and this time the reserve price was reduced to Rs. 60.53 Crores. Then, reference has been made to Rule 33-A, which prescribes procedure for evaluation of reserve price, and factors to be taken into consideration, to be including the last year's collection of royalty, contract amount presently in force, expected increase in the revenue etc. It is then alleged, that the petitioner did not submit any tender in response to this notification also, keeping in view the high figure of reserve price. However, the petitioner came to learn, that private respondents made offer to the tune

of Rs. 58.31 Crores, and the respondents being hands in glove, have recommended the offer for approval by the Director, and thus it is claimed, that the petitioner has been deprived of his valuable right to make offer, which is much less than the reserve price, as the offer below reserve price had been rejected in the past. According to the petitioner, the Department called the private respondent to deposit the security amount within three days vide communication dt. 23.3.2007, and informed the private respondents of his provisional selection. These communications have been produced as Annexure-5 and 6. It is alleged that immediately on coming to know of this, the petitioner gave its offer to the tune of Rs. 59.32 Crores vide Annexure-7, but his offer is not being processed in an earnest manner, and the authorities are acting contrary to the interests of the Revenue. The contract is to commence from 1.4.2007, and till the date of the filing the writ petition, the Director has not accorded its approval nor is considering the offer of the petitioner. Interalia with these factual averments the writ petition has been filed, on the grounds, including, that by granting the contract below statutory reserve price, the respondents are depriving the petitioner of his right of having state largess, which is contrary to Article 14 of the Constitution, that when earlier, the offers, which were received were not conforming reserve price, the bids were not entertained, and the reserve price was reduced to Rs.

60.53 Crores. In these circumstances it was not open to accept the new offer, of an amount less than the reserve price, which is per-se illegal and arbitrary. It is then alleged that under bonafide faith and belief that the reserve price is not viable, the petitioner did not submit his tender, as such it is not open to the State to accept the tender giving the bid of the amount which is less than the reserve price, if it were desired to be so done, it was required to be again notified, so as to offer equal opportunity to all the persons concerned. The other ground given is, that the petitioner is a registered contractor, and desirous of having contract, he made an offer of Rs. 59.32 Crores, which is definitely higher than the offer made by the private respondent, there is no reason to refuse to consider the same, which will cause loss to the revenue of the State, and deprive the legitimate right of the petitioner. The other ground given is, that the action of the respondents smacks of malafide, and that there was no stipulation in the tender notice, informing that the Government may entertain a tender of an amount less than the reserve price, with the result that the persons like the petitioners are being deprived of their right of submitting their offer. Then, it is contended that even on a combined reading of Rule 33A and Rule 35 the only conclusion is, that no offer less than the reserve price can even be entertained. Interalia on these grounds it is prayed, that the order dt. 23.3.2007 may be quashed, the

decision taken by the respondent no. 3 for selecting private respondent in pursuance of tender notification dt. 6.3.2007 be declared illegal. Respondent authorities be restrained from approving and awarding the contract in favour of private respondent, the respondents be directed to accept the bid of the petitioner, which is more than the bid offered by private respondent, and prayer for interim stay has also been made.

An interim reply has been filed on behalf of both the sets of respondents; one being respondents no. 1 to 3, hereafter to be referred as the State respondents, and the other by the private respondent no.4. In the reply filed by the State respondents, the background of the case has been purportedly given, pleading that the contract was given to one M/s. Dev Ganga Enterprises for the period 19.7.2003 to 31.3.2005 for a sum of Rs. 42.30 Crores. Then, for subsequent period from 1.4.2005 to 31.3.2007 the tenders were invited but no appropriate tenders were received, hence existing contractor was allowed to run the business for another 3 months, and thereafter also nobody came forward and for one month or so the Department was required to execute the work of excess royalty collection, and subsequently from 3.8.2005 to 31.3.2007 contract was given for collection of excess royalty to M/s. Kalpatru Enterprises for a sum of Rs. 45 Crore and odd, which was to expire on 31.3.2007. Then, sequence of events have been

pleaded, that on 20.1.2007 tender notice was issued but nobody submitted any tender, and fresh notice was issued on 14.2.2007, in response to which two tenders were received; one was submitted by the private respondent and the other was submitted by M/s. Rebecco Exporter for a sum of Rs. 53 Crores and odd. Then, the matter was considered by a committee of five officers, and the reserve price was reduced to Rs. 60.53 Ccores, and the tenders were invited, in pursuance to which four tenders were received, out of which two were found to be bogus, as there were no name of any of the part/tenderer and both the tenders were blank. However, the private respondent submitted tender for a sum of Rs. 58,31,21,731/- while the tender submitted by the Rebecco was for a sum of Rs. 51 Crores, and since the financial year was going to expire, exercising powers under Rule 35(f) the tenders given by the private respondent was considered by the competent tender committee, and the committee provisionally selected the private respondent for grant of contract. Then, the matter was considered by the committee of four officers, and the matter was recommended to the Director, who has ultimately sanctioned the award of contract to the private respondent. Then, some preliminary objections have been raised, that the allegation of malafide is bald and vague. Then, it has been pleaded that the petitioner has not disclosed the source wherefrom he has obtained the copies of Annexure 5 and 6, which shows that he has made an attempt to over-reach, and on this

conduct itself he is not entitled to relief in writ jurisdiction. The other objection raised is, that the petitioner filed writ petition on 28th, and made representation on 28th, while saying that he has made representation that his offer is not being processed. Thus, the petitioner has not come with clean hands. Then, it is pleaded that tenders were invited thrice, but the petitioner never submitted his tenders, and in view of the powers conferred under Rule 32, 35 and 37, the tenders submitted quoting less than reserve price can also be considered, and thus the petitioner has no locus standi to file the writ petition. Then, it was pleaded that vide Annexure R/2 the offer given by the petitioner has been declined, against which the petitioner could file revision, but without exhausting alternative remedy, has filed the present writ petition. Interalia with these averments it is prayed that the writ petition be dismissed.

Then, in the reply filed by the private respondents, it is contended, that the petitioner has no locus standi to file the present writ petition, and cannot be said to be an aggrieved person, as it did not submit any tender, nor even deposited any earnest money by purchasing the tender document, rather the petitioner has not participated in the tender process, and having remained away at this stage, he cannot be allowed to challenge the action of the department in awarding contract to the

private respondent below the reserve price, as no tender was received either quoting reserve price, or over and above the reserve price, and since financial year was expiring, the Department was keen to award the contract, and that no illegality has been committed in accepting the bid of the private respondent. It was pointed out that amount offered by the private respondent is much higher than the amount for which the contract was given in the last year, which was awarded for Rs. 45 Crores. Then, it was pleaded that the petitioner has made deliberate attempt to mislead the Court by not placing all the necessary facts. It was pointed out that two offers having been received in response to tender notice dt. 14.2.2007 was reported in detail in the newspaper produced as Annexure R 4/2. In such circumstances notice was issued third time on 6.3.2007, in response to which the private respondent submitted tender, and apart from M/s. Rebacco Export no other tender was received. In such circumstances the Department considered the fact, that the fresh contract is required to be granted before 1.4.2007, and the Department had the power under Rule 35(f) to relax the reserve price upto 10%, and accordingly accepted the tender given by the private respondent; apart from the fact that the offer given by the private respondent is much higher than the existing contractor. The private respondent has deposited necessary security on 26.3.2007, and thereafter the Department has also issued acceptance of tender and awarded

contract vide Annexure R 4/5, and since the petitioner never cared to participate in the process, and remained sitting on the fence, he cannot be allowed to raise grievance, that they are now willing to participate in the bid, by offering higher amount. It is pleaded that Rule 33-A does not restrict the authorities of the State to award the contract below the reserve price, rather it only provides criteria to be considered, while fixing the reserve price. On the other hand Rule 35(f) clearly empowers the Department to relax the reserve price upto 10%, and the petitioner deliberately has not made a reference to this rule. Then, it is pleaded that interference in such matters is not required to be made unless there is gross violation of the settled principles of law, which does not exist in the present case. Interalia with these averments, it is prayed that the writ petition be dismissed.

This writ petition was listed in the Court on 28.3.2007 itself, on which date the private respondents appeared as caveator, and the Addl. Advocate General was directed to accept notice, and the matter was ordered to be listed on 29.3.2007, and then on 29.3.2007 the counsel for the petitioner submitted, that the petitioner is prepared to give a higher bid of Rs. 60.56 Crores, and the matter was adjourned to 2.4.2007, and it was directed that till then the tender finalized in favour of respondent no.4

shall not be executed. However, the State may allow the existing contractor, or any other person, to run the royalty collection work, which shall not form the part of tender/contract in issue. Then, the matter came up on 6th, on which date it was heard.

Then, in Writ Petition No. 1729 also, the petitioner is private limited company and registered as A Class contractor valid upto 31.12.2008. Identical factual averments have been made. However, it is alleged, that the petitioner company offered its bid of Rs. 59,31,21,000/- vide express telegram Annexure-6. More or less identical grounds have been raised in this writ petition also. In the reply of the State, it is contended, that there was no express telegram, rather a representation which is said to have been issued on 27.3.2007, was received by the respondent no. 3 on 28.3.2007, and the petitioner attempted to mislead this Court. On other pleadings identical stand has been taken, as taken in Writ Petition No. 1728. This matter also came to be listed on 28.3.2007, and in identical manner, respondent no. 4 appeared as caveator, and the Additional Advocate General was directed to accept notice, and the matter was listed on 29.3.2007. Then, on 29.3.2007 the counsel for the petitioner submitted, that the petitioner is prepared to give higher bid to that of Rs. 60.53 Crores, and the matter was adjourned to 2.4.2007, and then came to be listed on 6.4.2006, on which date it

was heard.

Arguing the writ petition, after giving facts, these very grounds as given in the pleadings were practically reiterated, and reliance was placed on the side of the petitioner on the following judgments of Hon'ble the Supreme Court, and one judgment of this Court, being as under:-

1. Ramana Dayaram Shetty Vs. International Airport Authority reported in AIR 1979 SC-1628
2. M/s. Erusian Equiptment & Chemicals Ltd. Vs. Union of India reported in (1975)1 SCC-70
3. Ram and Shyam Company Vs. State of Haryana reported in AIR 1985 SC-1147
4. Anil Kumar Srivastava Vs. State of U.P. reported in (2004) 8 SCC-671,
5. H.U. Construction Company & 2 Ors. Vs. The State of Raj. Reported in 1993(1) WLC(Raj.)-280

I have considered the submissions, and have gone through the judgments.

First of all I take up Ramana's case on which strong reliance was placed by the learned counsel for the petitioners. It was contended, that it has been held therein that where the tender notice states the terms of

eligibility, it is not permissible to the authorities to grant a contract to a person not possessing that eligibility, as the eligibility was an objective and not subjective part, and that, that was a litigation initiated by a person who also did not submit tender, like the present petitioner, and the petitioner therein was also not possessing requisite eligibility of five years of experience of second class hotelier, and in para-8 of the judgment it was held, that it is not possible to justify the action of the first respondent on the ground that the first respondent could have achieved the same result by rejecting all the tenders, and entering into direct negotiation with the 4th respondent. Then reliance was also placed on para-10, wherein it has been observed, that it is well settled rule of administrative law, that an executive authority must be rigorously held to the standards by which it professes its actions to be judged, and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. The principle propounded in Ramana's case is not in dispute, and the judgment still hold good. However, in para-35 it has been held by Hon'ble the Supreme Court, that on the view taken they should have ordinarily set aside the decision of the 1st respondent accepting the tender of 4th respondent, and contract, resulting from such acceptance, but in view of the peculiar facts and circumstances Hon'ble the Supreme Court did not think it to be a sound exercise of discretion

to upset the decision and void that contract. It was found that it does appear from the affidavits filed by the parties, that the appellant has no real interest in the result of the litigation, and after considering other attending circumstances Hon'ble the Supreme Court declined to interfere in the grant.

The judgment in M/s. Erusian Equipment & Chemicals' case, in my view the case has no bearing on the present case, inasmuch as in that case the petitioner was found to have been black listed, and therefore, his bid was rejected, and it was found, that the said black listing was done without giving any notice, and therefore, it was held that the order of black listing has the effect of depriving of a person of equality of opportunity in the matter of public grant, however, opportunity of hearing was required to be given, and it was directed, that the authorities will give opportunity of hearing to the petitioner to represent their case, and the authorities will hear the petitioner as to whether their name should be put on the blacklist or not. But then it does not appear, that any interference in the contract was made. Therefore, this judgment need not detain me.

Then, coming to the judgment in Ram & Shyam Company's case; In that case of course interference was made in the action of the State in the grant of lease to

respondent, whose bid had no co-relation with the reserve price, was interfered with. But then, the facts were different, inasmuch as in that case the appellant did participate in the action, and gave highest bid, which was accepted by the Presiding Officer, but the State Government did not confirm the it, and on some internal communication throwing aspersions, the offer so received by the private respondent was accepted. Needless to say that, that was a case where the appellant had participated and had given highest bid, while in the present case admittedly the petitioners have not at all participated in the process. Therefore, this judgment does not help the petitioners.

So far the judgment in H.U. Construction Company's case is concerned, that was cited only for the purpose of reciting the argument of Mr. Lodha, where Mr. Lodha had argued, that the government cannot act in any manner which would benefit a private party at the cost of the State, such an action would be both unreasonable and contrary to the public interest. The Govt., therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Suffice it to say, that argument made by Mr. Lodha appearing against State cannot bind him while he is arguing for the State. It is not shown that argument

made by Mr. Lodha was accepted in that case. Lawyer is always free to argue the different proposition in different case, when he is appearing for different parties, and what is binding is, the principle laid down by the Court. In H.U. Construction Company's case, Mr. Lodha was appearing for the petitioner, and against the State, therefore, H.U. Construction Company's case does not help the petitioner.

Anil Kumar Srivastava's case was cited for the purpose of expressing the purport and effect of reserve price, and to contend, that the contract could not have been granted for the amount less than the reserve price.

So far the judgment cited by the learned counsel for the petitioners are concerned, I have recapitulated them, and discussed them. Coming to the facts of the present cases, to put it very briefly, the precise case of the petitioner is, that once a reserve price is fixed the contract could not be granted for any price less than the reserve price, and that, if this were required to be done, a fresh advertisement should been issued, as the petitioners in either case did not find the reserve price to be viable, and therefore did not submit the tender. Of course, State has relied upon the provisions of Rule 35(f), which provides, that tenders received recording a fall in comparison with that of previous lease or contract in the same area beyond a specified limit, shall not be accepted

without prior approval of the Director. Meaning thereby, that even the tenders received recording fall in comparison to previous lease or contract in the same area can also be granted in certain circumstances ,with the prior approval of the Director. It of course, does indicate, that the reserve price does not have any sacrosanct, as is sought to be contended. But then, I am not considering the case from this stand point, inasmuch as what is the million dollar significant circumstance, that exists in the present case is, that precise ground given by the petitioners is, that the petitioners did not submit tender, as it did not find the reserve price viable, and the petitioner would have submitted tender, had it been known that the tender offering less bid amount than the reserve price is going to be accepted, is knocked down from what appears from the order-sheet dt. 29.3.2007, existing in Writ Petition No. 1728/2007, wherein it was offered by the learned counsel for the petitioner, that the petitioner is prepared to give higher bid of Rs. 60.56 Crores, while in Writ No. 1729/2007 the counsel submitted, that the petitioner is prepared to give a higher bid of Rs. 60.53 Crores. It may be recalled that Rs. 60.53 Crores is the reserve price. This one fact, by itself does show, that the petitioner feels that the contract is very much viable, even above the reserve price, and therefore, it cannot be said, that the petitioner did not happen to submit the tender because it was calculated to be not viable, with reserve price, and obviously the

petitioner did not submit any tender whatever. Had any of the petitioners been desirous of taking contract, he/they could very well have submitted the tenders, quoting the reserve price, or the price as offered in the order sheet dt. 29.3.2007. In the second place, if it is assumed that the contract was not viable at reserve price, in that case also it cannot be said that if the authorities decided to grant the contract at some lower price, the action requires any interference.

In these circumstances, simply because a tender of a price below the reserve price has been accepted, it is not open to the petitioners to decry the action. The tender process has a sacrosanct, and after a tender is open wisdom may dawn on any number of persons, and many more things may develop and grow, but then, on that ground the tender process is not required to be interfered with. In the present case, so far factual aspect is concerned, as noticed above, the tenders were floated thrice, and it was in the third round that the tenders have been accepted. Ought we know, that the process would have gone endless, and term of the contract was expiring on 31.3.2007, while the earlier contractor was working only for Rs. 45 Crores, and that would be causing loss of revenue to the State. In such circumstances, if the decision has been taken by the authorities concerned, in awarding contract to the highest bidder, who quoted little lesser than the reserve price,

and much higher than the previous reserve price, it cannot be said, that the action of the respondent was tainted by oblique motive, or malafides, or extraneous consideration, much less intended to deprive the petitioners of getting the contract, so as to require interference in my writ jurisdiction.

Thus, I do not find any force in these writ petitions. The same are, therefore, dismissed summarily.

(N P GUPTA),J.